

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20530

In the Matter of)
)
Hearings on Competition and Consumer Protection) Project Number P181201
in the 21st Century)
)
State of Antitrust and Consumer Protection Law and)
Enforcement, and Their Development, Since the)
Pitofsky Hearings)
)
Identification and Measurement of Market Power)
and Entry Barriers, and the Evaluation of Collusive,)
Exclusionary, or Predatory Conduct or Conduct that)
Violates the Consumer Protection Statutes Enforced)
by the FTC, in Markets Featuring “Platform”)
Businesses)
)
Evaluating the Competitive Effects of Corporate)
Acquisitions and Mergers.)

**AMERICAN HOTEL & LODGING ASSOCIATION
COMMENT**

I. INTRODUCTION

The American Hotel & Lodging Association (“AHLA”) applauds the Federal Trade Commission (“FTC” or “Commission”) for launching a series of hearings to consider the interaction of consumer protection laws and agency enforcement priorities with changes in the economy and new technologies.¹ The members of AHLA—which include iconic global brands, hotel owners, real estate investment trusts, franchisees, management companies, independent properties, bed-and-breakfasts, suppliers, and state hotel associations—appreciate the Commission’s commitment to take a deep and broad look at a wide array of market

¹ *Hearings on Competition and Consumer Protection in the 21st Century*, Notice of Hearings and Request for Comments, 83 Fed. Reg. 38,307, 38,308 (Aug. 6, 2018).

developments, as well as its own authority. Staying informed of market developments regarding internet and online commerce is critical to the FTC's continuing success as a competition and consumer protection enforcement agency, and we look forward to providing the views of the lodging industry.

As outlined further below, the hotel industry is complex, segmented, and vibrantly competitive, whereas the online travel agency ("OTA") industry is highly consolidated, with two OTAs (and their subsidiaries and affiliates) accounting for *more than 95 percent* of OTA bookings. This level of OTA market consolidation directly and indirectly constrains hotels' ability to compete for direct bookings and creates customer service problems for guests who arrive at a hotel with certain expectations that are inconsistent with the service an OTA has provided to them—for example, booking a room with a king bed online, but discovering at the hotel that the OTA has never conveyed that expectation to the hotel or, worse, could not convey the expectation to the hotel because the OTA did not have king room inventory but sold it anyway. Consumers suffer when they are misled in this way, and hotels, carrying out the very definition of hospitality, do everything they can to accommodate the guest, even when the problem occurred when the consumer booked through an OTA site.

As the Commission considers the competitive effects of mergers, the state of antitrust and consumer protection law, and market power in markets featuring platform businesses, the online accommodations industry should be front and center. The unique combination of the agency's antitrust and consumer protection missions can be brought to bear to ensure consumers are protected when they book hotel rooms using an online platform, even with an OTA duopoly.

II. BACKGROUND AND INDUSTRY OVERVIEW

There are more than 54,000 lodging properties nationwide, which translates into eight million U.S. jobs and more than one trillion dollars in U.S. sales, and AHLA is proud to represent the breadth and depth of such a dynamic industry. The hotel industry is one of the ten largest business sectors in the United States and serves five million guests each day. Hotels invest in local communities across the country, spurring economic growth, and serving travelers from across the country and around the world. The hotel and lodging industry is full of unique opportunities for long-term careers and upward mobility, including programs supporting apprenticeships and funding college degrees for employees. The structure of the industry facilitates and promotes wage growth that benefits employees and their communities. Many hotels—more than 60 percent—are small businesses, and concentration in the industry overall is low. A hotel down the street may actually involve three different companies: the owner; a major brand that has executed a franchise agreement; and a management company. This market structure yields vigorous competition, which in turn gives consumers true choices about where they stay. It also makes advertising and distribution practices, including online reviews and placement in search results, vitally important to the industry.

As digital commerce has evolved and expanded in recent decades, the lodging industry has seen numerous changes. In particular, hotel owners, brands, and management companies face both opportunities and challenges as online accommodations platforms, such as OTAs and short-term rental sites, develop. AHLA has embraced the innovation, convenience, and competition that online bookings provide; indeed, the hotel industry was among the first industries to encourage consumers to book online. OTAs are key business partners of hotels,

helping hotels expand their reach and distribute inventory. In exchange, hotels pay commissions to OTAs, often at a rate of 25 percent or higher.

As the volume of hotel room bookings through OTAs has increased, OTA market structure and business practices have become sources of increasing concern with respect to their effects on consumers and competition. In 2017, online bookings (through all sources) accounted for nearly half (45 percent) of room nights in the United States.

Nearly one-third of online bookings are made through OTAs.² Of those, two OTAs, Expedia and Priceline, account for 95 percent of bookings.³ This is not transparent to the average consumer, who likely can name at least five different OTAs and believes them to be separately owned companies. In fact, AHLA data shows that nearly three-quarters (74 percent) of consumers are unaware that 95 percent of OTAs are owned by only two companies.⁴ In addition to better known OTA brands, Expedia and Priceline run “affiliate” programs. Thousands of small companies, and even individuals, can sell hotel rooms through these programs without contracting directly with hotels. Thus, as explained in more detail below, this level of concentration empowers OTAs to write algorithms that yield biased search results and creates opportunities for rogue affiliates to mislead consumers with little accountability.

Finally, short-term rental platforms, such as Airbnb, HomeAway/VRBO (now owned by Expedia as a result of its acquisition of Orbitz), and FlipKey, represent an additional aspect of the online platform economy that are creating new opportunities and challenges for consumers,

² In addition, AHLA data show that another one-third of customers visit an OTA to view choices before booking directly with a hotel. OTA listings thus are relevant in the decision-making for two-thirds of online bookings.

³ AHLA data for 2017 show 36.4 percent of OTA bookings through Booking.com (Priceline), 60.1 percent through Expedia, and 3.5 percent through other OTAs. Expedia’s associated brands include Travelocity, Hotels.com, Hotwire, Cheap Tickets, Trivago, and now Orbitz. Priceline’s associated brands include Booking.com, Open Table, and Kayak.

⁴ *New Research Reveals Online Hotel Booking Scams are on the Rise, Duping Consumers, Translating to Nearly \$4 Billion Each Year*, AHLA Press Release (June 14, 2017), <https://www.ahla.com/press-release/new-research-reveals-online-hotel-booking-scams-are-rise-duping-consumers-translating>.

hosts, and hoteliers. Although short-term rental platforms offer consumer benefits as an important part of the sharing economy, they are increasingly becoming commercial operations that are run as *de facto* hotels. These commercial operators, however, typically do not follow many of the laws and regulations that apply to hotels and are important to protecting consumers' health and safety (*e.g.*, a requirement to have a smoke detector in every bedroom). Guests have reasonable expectations of safety, based not only on their travel experiences but also on promises made by these platforms; the potential harm from accommodations that do not meet these promises (*e.g.*, renting a unit where a fire breaks out and there are no smoke detectors) is substantial. In addition, Airbnb hosts and guests both have reasonable expectations that it is legal to use the platform. However, many local laws and ordinances preclude short-term rental listings for many types of units, leaving hosts vulnerable to fines and enforcement action and creating a risk of eviction for unknowing guests.

III. COMPETITIVE AND CONSUMER HARMS FLOW FROM THE HIGHLY CONSOLIDATED ONLINE TRAVEL AGENCY MARKET

The Commission has asked for comment on the antitrust merger review process and on whether the platform business model has unique implications for antitrust and consumer protection law enforcement and policy. The state of the OTA market is relevant to both questions.

Four years ago, AHLA opposed the Expedia-Orbitz merger based on its view that the resulting consolidation of the online travel marketplace would harm consumers as well as AHLA members, particularly small business owners and franchised properties. The Department of Justice ("DOJ"), however, declined to challenge the transaction, concluding that: (1) the merger was unlikely to lead to the imposition of new charges on consumers; (2) Orbitz did not constrain Expedia's commissions in the years before the merger because Orbitz handled a small share of

bookings, and Priceline would provide an alternative to Expedia/Orbitz; and (3) new entrants (e.g., TripAdvisor Instant Booking, Google Hotel, and Flight Finder) could provide additional competition in the “rapidly evolving” online travel business.

Unfortunately, AHLA members’ experiences since 2015 have not been consistent with the DOJ’s predictions. Hotels have little leverage to resist increases in commission rates. They are also vulnerable to OTA practices that penalize hotels for demanding lower commission rates. With commissions paid by hotels to OTAs at a rate of 25 percent or more, it is clear why OTAs are motivated to prioritize or deprioritize certain listings. OTA “search bias”—including, for example, the practice of demoting a hotel in search rankings based on the commission it pays to an OTA, and the practice of “dimming,” or deliberately deprioritizing or minimizing a hotel’s appearance in search results⁵—is a way of threatening hotels that seek lower commissions.⁶ This pay-to-play ecosystem of online search drives up the cost of doing business, to the ultimate detriment of consumers.

These results were foreseeable. Walking away from one OTA would mean walking away from all of its brands; for example, Expedia is actually Expedia, Travelocity, Hotels.com, Hotwire, Cheap Tickets, Trivago, and Orbitz. Even the largest hotel brands cannot afford to

⁵ See Christopher Elliott, *How Online Travel Agencies are ‘Dimming’ Results on Hotel Searches*, WASH. POST, (Jul. 28, 2016) https://www.washingtonpost.com/lifestyle/travel/how-online-travel-agencies-are-dimming-results-on-hotel-searches/2016/07/28/16a33026-52ab-11e6-88eb-7dda4e2f2aec_story.html?noredirect=on&utm_term=.31989da8a469 (Expedia senior vice president acknowledging that one factor in Expedia’s search algorithm is the commission paid to the OTA). See also *Expedia Admits to Dimming Hotels, Pressure Forces Company to Ax Program Targeting Hotels Not Opting-In to Pay-to-Play System*, AHLA Press Release (Sept. 22, 2016), <https://www.ahla.com/press-release/expedia-admits-dimming-hotels> (“The tactic ... has severely limited consumer choice by creating a lack of transparency in the online booking process, by displaying only certain search results or removing photos and other important information from some listings to make those lodging facilities look less attractive. There have been no clear disclosures that inform consumers of the search bias. Therefore, consumers have been under the illusion that their search results are organic—when in fact they are far from it.”).

⁶ See Benjamin Edelman, *Impact of OTA Bias and Consolidation on Consumers at 3-4* (Jul. 12, 2017), <http://www.benedelman.org/publications/ota-bias-12jul2017.pdf> (stating that hotels typically pay OTAs commission of approximately 25 percent) (“Edelman Paper”).

forego listing on all of these sites, even if they will be listed on the Priceline platforms, because they cannot sustain the loss of access to such a broad distribution channel. Bed-and-breakfasts and innkeepers, primarily family-owned, mom-and-pop operations, are particularly vulnerable to OTA discrimination since they typically lack the capacity to advertise through other channels (e.g., television ads). Finally, there simply has not been entry into the OTA market at a level that disciplines the prices, *i.e.*, commissions, of the Expedia-Priceline duopoly. While competition of this sort would be welcome as a general matter, it is far from guaranteed that the entry of a new firm with expertise in search, such as Google, would have such a result. Such firms have a strong interest in selling their own ads, and this interest could just as easily lead to hotels being further disadvantaged through online search practices. Even now, Google search results for “lodging Washington, D.C.” yield primarily OTA sites and, on clicking through, do not provide the hotel’s own website as an option in most cases.

Through these hearings, the Commission has an opportunity to explore a broader view of competitive harm. Practices that might not directly affect prices that consumers see might still cause harm to consumer welfare.⁷ The Commission should also explore holistically how it can use its dual competition and consumer protection mission and authority to address consumer harms arising from platform business models. In areas that are as dynamic as online platforms, the Commission should continue to monitor markets post-merger for harms to competition and

⁷ This situation is distinguishable from the Supreme Court’s recent decision in *Ohio v. American Express*, 585 U.S. ____ (2018). First, the OTA market does not meet the Court’s newly-articulated category of “transaction platform.” In credit card transactions, a platform like Amex connects cardholders and merchants, allowing a buyer to obtain a product or service and pay later, while the merchant receives immediate payment. The buyer’s price does not change based on the credit card used. In contrast, when a guest books a room through an OTA platform, the price is as listed on *that* platform and inclusive of the commission the OTA is charging the hotel. In other words, the OTA is a seller, not a third-party facilitator like a credit card company. And while the hotel is in some ways also a seller, it is also the product. The guest still needs to go to the hotel and have the lodging experience. Moreover, even if the OTA market were a “transaction platform,” that merely means that both sides of the market must be taken into account in assessing competitive effects. Here, OTA search bias driven by commissions increases the cost of consumers’ transactions without a corresponding consumer benefit. This is underscored by the lack of competition among the OTA behemoths, in contrast to the wide variety of credit cards.

consumers, and think broadly and creatively about how it can use either side of its authority—or both together—to remedy harms that it identifies.

A. *SEARCH BIAS*

The problem of search bias in online accommodations platforms has its roots in the highly consolidated marketplace that followed the Expedia-Orbitz merger. Search is vitally important to how consumers book hotel rooms. Whether a consumer is searching for a hotel in a city she has never visited, or she wants to compare a few specific options, a search on an OTA platform is often the first step. In quantitative terms, there are 500 online hotel bookings per minute. Approximately one-third of these bookings occurs through OTA platforms, and another one-third of bookings occurs directly through a hotel site *after* consumers look at options on an OTA platform.⁸ As the Commission has long recognized, the order of search results is important to consumers, and consumers expect default search results to be objective.⁹ Meeting this expectation is especially important in a market that is as heavily search-driven as online hotel bookings.

Harms from Non-Objective Search Results. Search bias violates consumers' expectation of objectivity. Consumers are under the illusion that their search results are organic, when in fact they are far from it. As one leading scholar has noted, search bias “is inherently deceptive and indeed intentionally deceptive,” and “disclosure is surely needed to alert consumers to the advertising [in the form of hotel payments to OTAs that affect search results] they are seeing and the potential omissions.”¹⁰ There are, however, no clear disclosures to

⁸ The remainder of bookings occurs through other channels, such as phone reservations and walk-in reservations.

⁹ *See, e.g.*, Letter to Gary Ruskin, FTC Staff Letter, at 2 (June 27, 2002), https://www.ftc.gov/sites/default/files/documents/closing_letters/commercial-alert-response-letter/commercialalertletter.pdf (stating that consumers expect search results are “based on relevancy to the search query, as determined by algorithms or other objective criteria” that are “based on a set of impartial factors.”)

¹⁰ Edelman Paper at 5.

inform consumers of search bias. AHLA consistently has cautioned consumers to be skeptical of rankings offered through online travel company websites that do not offer proper disclosures about criteria used, but these warnings are no substitute for clear disclosures or other measures.¹¹

Harms from Retaliatory Search Results. In addition to the general harms of search bias, search results can be used in a punitive manner that adversely impacts competition. For example, as discussed above, in 2016 Expedia admitted to “dimming” hotel listings on expedia.com and affiliate sites and stated that it would end this deceptive practice. The tactic, which was meant to disadvantage some hotels that had not opted into some of the OTAs’ “sales programs” involving a pay-for-play scenario, severely limited consumer choice. It created a lack of transparency in the online booking process by displaying only certain search results or removing photos and other important information from some listings to make those lodging facilities look less attractive.

The Commission’s dual authority offers distinct alternatives to address these kinds of harms.¹² Viewed from an antitrust perspective, search bias could be seen as a form of retaliatory conduct.¹³ One potential response would be to prohibit firms that use search bias as part of an

¹¹ For example, recent data shows 79 percent of consumers use “digital middle men” because they believe they will find better deals. That belief is fueled by misleading marketing practices like “slash” or deep discount pricing, which is not based on any actual room rate set by the hotel. OTAs also create a false sense of urgency; almost half of consumers (45 percent) have reported being influenced by messages that say, “Only 2 rooms left!” These messages are not based on full room inventory from the hotel, but are merely misleading marketing tactics promoted by booking sites. Focus group footage is available here: <https://www.youtube.com/watch?v=2S6cbv207p0>; https://www.youtube.com/watch?v=_9we2GEmM_M.

¹² AHLA recognizes that, if the FTC were to investigate OTAs under its competition authority, it would need clearance from DOJ. See Dept. of Justice Antitrust Division, *Antitrust Division Manual* III-6 (5th ed., Aug. 2017), <https://www.justice.gov/atr/file/761141/download>. For the purposes of discussing intertwined competition and consumer protection issues, which the FTC is uniquely positioned to handle together, in connection with policy-focused hearings, this detail is not relevant.

¹³ See Dept. of Justice, Antitrust Division Policy Guide to Merger Remedies 16-17 (June 2011) (describing use of anti-retaliation provisions as a merger remedy), <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>.

abuse of market power or other anticompetitive conduct from engaging in search bias and to require default search results to be based on “objective” factors, rather than a firm’s strategic interests.

Alternatively, viewing search bias as a consumer protection concern, the Commission could require clear and conspicuous disclosure of the fact that OTA listings are not objective or comprehensive, *e.g.*, some hotels that are potentially relevant to a query may not be listed at all.¹⁴ The FTC has long held that disclosure is required when consumers might not recognize that a given piece of information is advertising. Requiring OTAs to disclose that their results are not comprehensive (or, alternatively, only include hotels that agree to pay in some manner to be included in the OTAs’ listings) might encourage consumers to at least visit hotels’ websites before booking a room. Increasing consumers’ use of hotel brand sites could counter some of the effects of rate parity by increasing consumers’ awareness of price competition through means that rate parity agreements permit, such as discounts for loyalty club members and prepaid rooms.

B. ONLINE BOOKING SCAMS

In addition to harming hotels and, ultimately, hotel guests, the level of market concentration in the OTA space helps facilitate online booking scams. Both OTA parent companies have affiliate relationships with thousands of smaller websites that offer hotel rooms for booking, some of which have misled consumers who think they are booking directly with a hotel. Deceptive practices harm consumers, who don’t get what they want or expect, suffer the loss of reservations, or face unexpected charges and fees. These practices also damage hotel reputations and reduce consumer confidence in the online booking process and in hotels overall.

¹⁴ Edelman Paper at 9.

Rogue OTA affiliates posing as direct hotel booking sites mislead millions of consumers per year.

AHLA's data show that one in five consumers has been misled by third-party affiliates.¹⁵ Specifically, these 20 percent have booked travel online and spoken with someone over the phone who sounded like they were the hotel, only to find out later they had spoken to a third party. Similarly, nearly one in five has booked travel online with what they thought was the hotel and later discovered they had actually booked with an online travel company booking website instead. About half who booked through a third party experienced a booking problem, such as extra fees from the third-party website charged to their credit card, requested a special room but the request was not relayed to the hotel, or the reservation was lost and the consumer had to book another room, losing the cost of the original reservation.

The Commission has taken important actions to protect consumers in the lodging space, including issuing consumer alerts highlighting booking scams and offering tips to avoid misleading booking sites¹⁶ and, most recently, bringing an enforcement action against OTA affiliate Reservation Counter.¹⁷ While AHLA is grateful for the Commission's action regarding Reservation Counter, we continue to hear about consumer booking scams. In these hearings, the Commission can examine how concentration in the OTA market and a structure that affords hotels no direct leverage vis-à-vis OTA affiliates encourages rogue affiliates to engage in

¹⁵ In 2015, just six percent of travelers reported booking on what they believed was a hotel's official website, only to find they had booked on a fraudulent site not affiliated with the hotel. Just two years later, the number of travelers who have experienced this has nearly quadrupled to 22 percent.

¹⁶ See, e.g., FTC, *Did You Book That Night at the Hotel's Site?* (Jul. 14, 2015), <https://www.consumer.ftc.gov/blog/2015/07/did-you-book-night-hotels-site>.

¹⁷ Complaint, FTC v. Reservation Counter, LLC, 2:17-cv-01304 (D. Utah Dec. 21, 2017).

deceptive practices.¹⁸ The Commission could also consider bringing enforcement actions against other OTA affiliates that are deceiving consumers, issuing business guidance delineating clear expectations with respect to the actions of OTAs and their affiliates, and investigating OTAs' arrangements with their affiliates to see how OTAs avoid responsibility for scams.

IV. SHORT-TERM RENTALS: AIRBNB'S DECEPTION IN ONLINE COMMERCE

As the Commission evaluates in these hearings the potential for harms caused by online platforms, the Commission should also consider addressing competition and consumer protection issues relating to short-term rental platforms, such as Airbnb, HomeAway (owned by Expedia), and FlipKey. Short-term rental platforms are distinct from OTAs, and a full understanding of the lodging industry must take short-term rental platforms into account. Still, any action the Commission takes with respect to OTAs will send a signal to short-term rental platforms that the FTC is watching the marketplace closely to keep it free of conduct that harms competition or consumers.

Although short-term rental platforms offer consumer benefits, they also present risks for consumers who serve as hosts and stay as guests in rental units. Airbnb in particular creates unreasonable risks through deceptive practices. In addition, Airbnb engages in unfair competition by allowing its platform to be used by commercial operators who run *de facto* hotels without complying with any laws or regulations applicable to hotels.

The Airbnb business model represents a departure from the traditionally well-regulated lodging industry. Airbnb is a service that connects transient guests with property owners who wish to provide short-term lodging. The company does not own real estate, but rather acts as a

¹⁸ See Aaron J. Burstein, *Search, Advertising, and Online Distribution: Practical Guidance and Open Questions Under FTC Standards*, 32 ANTITRUST 68, 70 (Summer 2018) (“The FTC’s action against Reservation Counter makes it clear that the agency may take action against companies that use search ads to grab the attention of consumers and create the misimpression that they are more than a middle man.”).

broker between the parties to a lodging transaction that facilitates communication, reservations, and payments. Airbnb earns its revenue through service fees imposed on bookings made through its platform. Airbnb has around 4.5 million listings in 81,000 cities in over 191 countries and has brokered more than 300 million guest stays.¹⁹ Hosts can list whole residences or individual rooms within residences through Airbnb. Hosts may also remain present during guest stays or allow guests to use the property without being present.

Airbnb's representations mislead reasonable consumers on issues that are important to their decisions about whether or not to seek accommodations using the service. Consumers often put hundreds or thousands of dollars, as well as their own apartments or houses, on the line, but Airbnb goes out of its way to downplay these risks and create the impression that safety is one of its top priorities. In fact, Airbnb co-founder Joe Gebbia said that Airbnb bet the "whole company on the hope that with the right design, people would be willing to overcome the stranger danger bias."²⁰ "Design" to make consumers *think* they are safe does not equate to actual safety. On the host side, Airbnb, a nationwide (and international) platform, conceals that short-term rentals are illegal in many local markets and may put hosts at risk of enforcement fines or eviction. This is intentional: If Airbnb adequately disclosed its inattention to safety and the illegality of the units listed on their platform, at least some consumers likely would choose differently.

V. CONCLUSION

The Commission is embarking on comprehensive hearings to examine the state of the market and its own authority for the first time in more than 20 years. The online accommodations market represents the intersection of the Commission's dual missions to ensure

¹⁹ See <https://press.atairbnb.com/fast-facts/>.

²⁰ See Joe Gebbia TED Talk, *How Airbnb Designs for Trust*, <https://youtu.be/16cM-RFid9U?t=9m40s>.

competition and consumer protection. This agency should be aware that OTAs are in the booking business, not the hospitality business, and should address marketplace developments and the prospect of consumer harm accordingly. AHLA encourages the Commission to include discussion of this market and its effects in the upcoming hearings and welcomes the opportunity to assist the Commission in this regard.

Respectfully submitted,

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